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ADDRESS TO THE LAW CLASS

AT THE
UNIVERSITY OF NORTH CAROLINA

31 JANUARY, 1919

By CHIEF JUSTICE WALTER CLARK.

I am always glad to meet young men. You represent the future. You are not yet bound down by habits of thought and action which have become second nature. The horizon of young men is all before them and has no limit. You can truly say,

"No pent-up Utica contains our powers.
The whole boundless continent is ours."

It is always pleasant to return to Chapel Hill, but on this occasion it is with feelings of unusual sadness, for you sit under the shadow of a great affliction. The University has lost two of its most distinguished and able sons—the loved and gifted President of this University, Edward K. Graham, who did so much for its advancement and to place it in the forefront of the great educational institutions of this country, and more recently Dean M. H. Stacy, whom all men had picked out for his successor and who was on the eve of election when he met his untimely death.

At the recent Centennial of the Supreme Court in Raleigh one able speaker portrayed the great changes which have been made in law and procedure in the last hundred years, and another foretold some of the changes which might occur in the next one hundred. I shall not attempt to repeat what they so well said. There is left the law as it now is, but as that is being told you daily by your teachers much better than I can tell you, and more at length, I must keep off that ground. I can conceive of nothing left open to me except to say somewhat of the law as it ought to be.

The demand of the age is for *efficiency* in every line of business. It is not undue criticism to say that no business in this country is run with less efficiency than the administration of the law and the courts. No other business known to man could survive the inefficiency that is shown in that department of life. I will not say of "activity" because it is not active. Yet there is no profession which attracts a larger per cent of the talent of the country than the law. Young men go into the profession eager, hopeful, expectant of reforms in practice, in procedure and in substantive law. Some of them may preserve that attitude even

until they get upon the Bench. But sooner or later the routine is too powerful for most. The habit of consulting precedents and yielding obedience to the thoughts of dead men as embodied in the decisions of the priests and laymen, who as judges created the "common law," is too strong, and the habit of delay and postponement becomes a part of their existence. After they enter the profession some undergo the same metamorphosis as the sisters of Phæthon or Daphne, so vividly described by Ovid, and become rooted in the débris of the past and immobile; but, unlike Daphne, they are not changed into laurel.

THE EXECUTIVE AND JUDICIAL VETO

The President of Harvard College in a recent work truthfully declared that in this country public opinion and the will of the people are slower in gaining control than any other country in the world. This may seem strange to you, but the fact is that our Constitution is now the oldest upon the planet. In this country almost alone the Executive still has a veto, which was given lest the Senate and House might not prove safe and sane. In all the States of this Union, except North Carolina, the State constitution has put the same bridle in the hands of the Governor. In England, the formality of the sovereign "approving" the acts of Parliament is retained, but it is only a formality, for no executive in that country since 1707 has dared to veto an act of Parliament. In the other constitutions of the world, with few if any exceptions, the executive or sovereign is denied any veto upon the expression of the will of the people through its lawmaking body. In this country we have gone further by allowing also the assumption by the other coördinate department of the government, the judicial, of the power to veto the action of the representatives chosen by the people to formulate their will into law. This power is not conferred by any provision in the Constitution of the United States or of any State, and it is utterly unknown in the history of all other countries. The U. S. Supreme Court took this power to itself in *Marbury v. Madison* in 1803, and all the State Supreme courts have followed suit.

At Rome, the privileged classes when afraid to directly oppose measures in the popular interest had resort to the system of Augurs. When an assembly was about to be held in the *Campus Martius* at which the vote was likely to be hostile, these augurs, always selected by the patricians, would adjourn the meeting upon the ground that the augurs declared it was not an "auspicious" day, or that the sacred chickens kept by the priests were off their feed, or the entrails of the sacrificial victim showed that it was unsafe to proceed, or that the flight of birds betokened danger, or some other similar device was resorted to. Cicero said that he did not see how an augur could pass another without laughing in his face. These devices of statecraft used by the Romans to control the masses in the interest of the classes without a conflict are in nowise superior to the action of the judicial augurs who always find any act of

Congress or of a State Legislature "unconstitutional" if it conflicts with their preconceived opinions. The judicial veto must exist "by divine right," like that claimed by kings of old, for it has no visible authority and rests upon the "imperturbable perpendicularity of assertion" only.

In addition to the double check-rein upon legislation of the veto given the Executive by the Constitution, and the veto assumed by the courts without any constitutional provision, we have the arrangement by which members of Congress (in ordinary course) do not meet until thirteen months after they are elected. The result is that the popular impulse which chose Representatives and Senators has then lost its force and the Special Interests have had thirteen months to change the views of those elected. Besides, the Congress that is repudiated at the polls has four full months to enact their measures before their mandate expires on the 4th March following. Every effort to change this anomaly has been defeated at Washington. The great vested interests and corporations have never been willing to release this advantage. In other countries, as under our State Constitution, the terms of the new members begin on the day of their election.

DISSENTING OPINIONS

The Interests have always been busy in the effort to create a sentiment against dissenting opinions. A dissenting opinion is an appeal from the majority of the Court to the sovereign whose servants they are. If the judge delivering the decision of the majority ought to give his reasons, certainly the judge or judges who refuse to go with the majority owe it to themselves and to the public to give their reasons for not doing so. The reasons given in such opinions have been the safeguard of the republic on more occasions than one; besides, the fear of them has prevented many a decision that would have been rendered. By his dissenting opinion in *Chisholm v. Georgia*, Mr. Justice Iredell, of this State, awoke the people of the Union and caused the prompt enactment of the Eleventh Amendment. The dissenting judge who immortalized himself in the *Dartmouth College Case* has practically repealed that decision. The dissenting judges in the *Income Tax Case* caused the enactment of the Sixteenth Amendment—but for which this country would have been disabled to engage in and carry on to a successful end the great war which has just closed. And the dissenting opinions in the *Lochner Case*, which brutally held that a State had no power to protect its citizens from being worked ten hours a day in a temperature of 120 degrees, have forced the highest court in the land to repeal its own violation of the Constitution and of the rights of free men in that case by holding valid the Adamson Law which gave to the railroad employees of this country an eight-hour day.

John Milton said, "I value no other liberty like the liberty of freely writing and speaking the truth"; and Thomas Jefferson, in his inaugural, said that he feared no assertion of error if the truth could be left

free to combat it. Only they fear the dissent of an honest judge who fear the verdict thereon of an honest and intelligent public. But for dissenting opinions the autocracy assumed by the courts would be absolute. Men who deny the right of a jury to find a verdict, upon the smallest facts, if even one juror dissents, illogically contend not only that a bare majority of the court should invalidate the best considered and most important statute, but would suppress even the expression of dissent by the minority of the judges.

There are many things which the young lawyers of the State can remedy when they come into the profession and before their youth and unbounded enthusiasm become petrified by the study of precedents. Lord Brougham said, "Touch but a single technicality, a single thread of her web, and the old black spider of Westminster Hall will rush out upon you with all her brood."

ROTATION OF JUDGES

Among other things needing remedy is first the antiquated rotating system by which our judges ride the districts in succession. No one cause probably contributes more to the delay and the costs of litigation than this. A judge is nominated by one district, but he can ride in succession the other nineteen, whose people had no voice in his nomination and to whom he is not responsible in any way. Aside from the great and useless expense devolved on the judge by such rotation and the long absences from his family (which deter many of the best men from accepting such position) and his ignorance of the people and the surrounding circumstances—a knowledge of which would be a great aid in the administration of justice—there is the constant, though it may be often unconscious, temptation to each rotating judge to "continue" cases, which are thus thrown in succession on judge after judge, and the absence of that sense of responsibility to the public which belongs to every judge who rides his own district only. This antiquated and obsolete system obtains nowhere in the world except in North and South Carolina. It has long been discarded in other jurisdictions.

REFORM IN PROCEDURE

Again, when the Code of Civil Procedure was adopted in 1868 it provided, as is still the case in the other Code States, that all summonses were returnable before the clerk at a date named therein—not less than ten nor more than twenty days after its issue; that if there was a demurrer it should be filed in three days and sent at once with the complaint to the judge at chambers, who should promptly decide and return it, and if an answer was filed the case should be transmitted to the first term of court for trial by jury. If neither answer nor demurrer were filed, judgment by default was taken before the clerk. In this way there was a practical and common-sense dispatch in the administration of

justice. But in our State at that time the people were largely in debt and delay, not expedition, in the courts was desired. Accordingly, the Batchelor Act was enacted to suspend this section, which was afterwards made permanent, and has prevailed for fifty years, by which a demurrer carries the case over to the next term; and then if there is an appeal there may be a delay of twelve months, and on its return the answer may be filed within a year or two and the trial on the facts happens when it may.

A census of the cases in our Supreme Court for the last year show that on an average appeals get to that Court in four and one-half years after summons issues. We have had cases there that have been pending twenty years, and indeed one case had been in court sixty years. No other business in the world could stand this method of procedure, and as a matter of fact a very large portion of litigation dies in the process, with wrongs unredressed and rights unadjudged.

Among the proposed betterments in trial practice is the suggestion of Prof. Hugo Munsternberg, that an instrument can be devised to tell when a witness is lying. This would save much time in trials. The theory is that it will raise his temperature and a delicate instrument would register the result. A lawyer not long since told an intelligent client that he would have to put him on the stand as a witness in his own behalf. With some trepidation the client asked if such a machine was in existence. The lawyer replied, "Of course there is; I married one."

DISQUALIFICATION OF WOMAN AS A WITNESS

Under the laws of North Carolina formerly no negro or Indian or person of mixed blood with as much as one-sixteenth negro or Indian blood, whether bond or free, was competent as a witness against any white person. (Rev. Code, p. 587.) In an eastern county of this State, in 1862, a most estimable citizen, while supervising the digging of a canal on his own land and unarmed, was shot down in cold blood, without provocation, by a neighbor who had a grudge against him, and who rode up on a horse with a double-barreled gun laid across the pommel. There were more than two dozen witnesses present. One of them, who was the foreman or contractor of the work, was a free colored person, the owner of property and of good character, but he had one-sixteenth negro blood in his veins. There were other free colored persons present as laborers, with some slaves hired from neighbors, and a dozen or more slaves of the murdered man. The murderer was promptly acquitted because there was no one who could testify against him under our law. That law has since been repealed and the jury are allowed to weigh the testimony of such witnesses for what they may deem it worth. The only statute in this State which now prohibits a jury to believe a witness who is competent to testify is that which provides that the jury shall not believe the testimony of the "*woman*" on an indictment for seduction, even though they do believe her, unless she is "supported" by other testimony.

From the nature of the transaction she is sometimes the only witness. The defendant has his testimony enhanced by the fact that he must be found guilty beyond a reasonable doubt. While the perpetrator of the foulest of wrongs is competent, the woman, who is embarrassed with her shame, the victim of his lust and lying and of her faith in him, is ruled out unless she can find some evidence to corroborate her. This is true though the law requires the jury to find beyond a reasonable doubt that the victim was a virtuous and innocent woman, and that there was a promise of marriage, while the defendant can offer all the testimony he can rake up to assail her life-long record. This blot upon our statute book, this discrimination against women, will be remedied when women have a voice in choosing legislators. It should be done now. It was Robert Burns who said, "Man to man so oft unjust is always so to woman."

In an Abbey in France there is a tomb to a knight of the olden time. On it lies his effigy in marble, with shield and spear, and on his armorial escutcheon there is engraved his name and the following words: "He was a good Christian and a good knight and traveled a long ways over the world deceiving the ladies." Our law in North Carolina seems not to have progressed beyond that sentiment.

THE NEGRO PROBLEM

A recent address speaking of the effect of the negro element in our midst expressed the opinion that only these four solutions were possible—i. e., (1) Amalgamation; (2) Extermination; (3) Emigration, or (4) Servitude.

It seems to me that, speaking to young men who may have read this statement, I should express the opinion that neither of these four is possible, and that by the observance of justice and due consideration for the rights of the weaker race the two races may, and in fact do, live amicably together. In truth, there is no "negro problem."

Amalgamation is not desired by either race, and the Census shows, with its stubborn figures, that its percentage has steadily decreased in each decade since the war, and has not increased. *Extermination* is impossible and no one will advocate it in this twentieth century after Christ. *Emigration* is also impossible. The colored people are nearly one-third of our population and furnish probably a still larger proportion of the labor upon which our very existence depends. Our agricultural products in this State last year brought \$700,000,000. The large portion of it created by colored labor if struck from our receipts would paralyze the State. In the main, they are industrious, peaceable, and inoffensive.

When "Peg-leg" Williams and one or two other labor agents sought to carry off a few of our colored laborers our Legislature promptly imposed a license fee of a thousand dollars and enacted other restrictive measures, which showed that the people of this State not only did not

wish, but would not willingly permit, the emigration of our colored labor. Colored labor has its faults—largely due to its environments and lack of education—but if the vacuum which it would leave were filled with Dagoes, Slovaes, Slavs and other white races, which now furnish the bulk of the immigration to this country, such labor would be more unruly, more given to strikes and more unsatisfactory.

The fourth and last alternative of *Servitude* cannot be contemplated a half-century after Appomattox. Throughout the former Confederate States there is not a neighborhood that would be willing to return to that form of labor.

In all the countries of the world the movement and migration of individuals and of peoples have been such that nowhere can there be found any large body of men entirely of one race. The English and a dozen races live amicably in India; and the same is true in all the more prosperous States of this country where the emigrants from abroad constitute a large part of the creative force known as the labor element. With us, the colored people are as a rule orderly, and not turbulent. Our Southern people know them well—their good traits and their failings. It would take us long to become accustomed to laborers of a different race. The progress and the development of any country depend upon its labor, which is the basis on which civilization rests. Without labor there can be no civilization.

SUFFRAGE FOR WOMEN

Then there is the certainty of the extension of the suffrage to women. This has been advocated by President Wilson, ex-President Roosevelt, and William J. Bryan, and is in the platforms of all the great parties. It is quite probable that the amendment to the U. S. Constitution will get the one additional vote necessary to pass it through the Senate between now and 4 March; and if not, it is certain to be enacted at the called session in the summer, and will be ratified, like the Prohibition Amendment, so quickly that women will vote in all the States at the November election next year. A little boy who had never seen his grandmother before, looking her over very closely, said: "Are you my grandmother?" She replied with much dignity: "I am your grandmother on your father's side." To which he replied: "You've got in on the wrong side. If you want to have any influence around this house you will have to be on mother's side."

Young gentlemen, you can take the hint. It is true the province of women is the home, but for that very reason they should have the ballot. Their vote will always be in the interest of the home and conservative, for morality, for education, for sanitation and for the protection of childhood. Mr. T. T. Hicks, in his address at the Centennial of the Supreme Court, truthfully and wittily said, "The objection of many politicians to equal suffrage is the fear that for them it would be an answer to the prayer of the Psalmist, 'Teach me to know mine end and

the number of my days.' " As a rule, women do not seek office; and as to his prediction that one of them may become Chief Justice, readers of the Scriptures will remember that Deborah was Chief Justice of Israel more than three thousand years ago, for it is said that she was judge over all Israel; and it is significantly added "and the land had rest for forty years." She was appointed, too, at a time when the Theocracy ruled and all selections for office were made directly by Jehovah.

A member of the Legislature has said, "I am for the women having the suffrage if they want it, but I cannot see why in the world they wish it." He is partly of Scotch descent and proud of it. Some one asked him if the Legislature could and should pass an act depriving all men of Scotch descent of the suffrage if he would be satisfied. He instantly replied that he and all other men of like descent would come down to Raleigh and tear down the Capitol. Yet he seemed to think that his wife, sisters and daughters should be content with their present exclusion from all share in the government and with being put in the same class with "convicts, idiots, lunatics and illiterate negroes."

The real influences against suffrage influences that count are the liquor interests, who feel that though Prohibition has been adopted, the vote of the women will make it more effective, and the employers of large bodies of labor, who fear that that vote will enforce the execution of the laws against child labor and will stand for shorter hours of labor. Then there is everywhere an organization, more or less perfect, known as "the machine in politics." This element have a large part of the vote of the men coralled and they fear that the coming of the women to the polls will break up their schemes.

It has been urged in opposition that if women vote the negroes will. There are 53,000 more white women in North Carolina than all the negro men and negro women put together, and the admission of the women to the ballot box will be the only certain guarantee of white supremacy. We must also face the fact that sooner or later the negroes will exercise the right to vote guaranteed by the Fifteenth Amendment. Every man who has registered, voted or held office in North Carolina during the last fifty years has taken an oath to "support and maintain the Constitution" which contains the Fifteenth Amendment. Our "Grandfather Clause" cannot and does not attempt to repeal that amendment. It merely disqualifies "illiterates," which the State had a right to enact. There is a provision therein of an exemption as to white people till 1908 from the disqualification, but that has been held invalid by three decisions in the 238 U. S. Reports, construing provisions in the Maryland and Oklahoma constitutions exactly like ours, and enforcing the Federal statute, which authorizes ten years imprisonment and a \$5,000 penalty and an action for damages against any registrar, poll-holder or other person making a discrimination in the exercise of the suffrage on account of race, color or previous condition of servitude. We have to face a condition, and not a theory, and our surest protection

is to increase the white vote by doubling the white majority. We have in this State about 70 white men to every 30 negroes—a white majority of 40. When women are admitted to suffrage we shall double these figures and will have 140 white voters for every 60 colored—a white majority of 80, just double.

The suggestion that admitting women to the ballot will enable the negroes to vote (who have been entitled to do so for fifty years under the Fifteenth Amendment) has no parallel in its logic except in the statement of the African guide who said "The little negro boys tie the ostrich's leg to the cocoanut tree and that accounts for the milk in the cocoanut."

LABOR ORGANIZATIONS AND SOLDIERS

The great growing power in this country is the labor organizations which have risen wherever large bodies of white men are engaged in industry. A hundred years ago in England laborers were forbidden under heavy penalties to organize in labor unions, and an attempt to procure higher wages, whether by peaceable demand, by strikes, or any other methods, was made a serious offense. This has long ceased to be the law there, and the history of legislation here is known to you all to have been in favor of larger opportunities to those who create the wealth of the country.

In England up to a little over one hundred years ago when a soldier or a sailor returned from the war there was no hospital, no soldiers' home, and no pensions for him. The generals, like Marlborough, Wellington and others, received immense grants of money and seats for themselves and descendants in the House of Lords, but the veterans who won the battle for them at Waterloo, at Trafalgar and at Blenheim were rewarded, if at all, by a permit to beg and with the statutory provision that if any discharged soldier or sailor should beg without receiving such permit he should be hanged, and some of them, forced by necessity to beg, were accordingly hung.

Farther back, after the great English victory at Crecy and the peace of Bretigny in 1359, when England annexed the larger part of France, Edward III. rewarded his victorious soldiers by refusing to permit any of them to return home, but disbanded them in the peaceful and prosperous province of Brittany with permission to plunder its rich and unoffending people at leisure and at their will, which the soldiery did. You will find the details stated as a cold matter of fact in the pages of Froissart. The different manner in which we are receiving our returning soldiers from France is proof of the consideration which the soldier has won since the day when laborers and soldiers and people existed only for the exaltation of those who held rule.

It is a common saying that young lawyers take to politics as a duck to water. As our profession furnishes all the judges (on the higher courts at least), two-thirds of the Presidents and Governors, and on an

average more than 60 per cent of the members of Congress and of the State Legislatures, this is but natural. Our profession not only largely make the laws, but construe them and execute them, and sometimes veto them.

CURRENT CAMOUFLAGE

As a large proportion of you will doubtless be in public life at some time, it may not be amiss to say to you that you should not be misled by the current camouflage nor mistake the use of phrases for sound argument. There are many of these, but I will mention briefly six:

1. *Personal Liberty*.—This is a good thing and deserving all honor, and every effort to maintain it, but, as Madam Roland said, "Oh, liberty, what crimes are committed in thy name!" Personal liberty has been thus used for a hundred years as the chief reliance of the saloons, the breweries, and their hirelings to delay and prevent the emancipation of the people from the iniquities of the liquor traffic. Only recently the people, still unaware of their power, with great speed ratified the constitutional amendment which the liquor interests thought they had defeated by requiring its adoption within seven years.

2. *States Rights*—has been another favorite camouflage with which to humbug the public. We all know that this is an element in our Federal Constitution, but it has been invoked for the protection of slavery, and on many other occasions to prevent all progress, as indeed it is now to defeat the just demand of the women for a share in the government. The Constitution expressly provides that it may be amended by a two-thirds vote in Congress and upon the ratification of thirty-six States, but they who are opposed to equal suffrage quote it as their chief defense, even those who have voted for the National Prohibition Amendment.

3. *Unconstitutional*.—This is another cry raised, in season and out of season, to defeat measures which, too strong for the lobby, have been voted by Congress and the Legislatures upon the demand of the people.

4. *Social Equality*.—This also has been used to frighten the people of the South into the abandonment of all measures of progress whenever other means fail. It is a scare-crow. Neither race desires it.

5. *Socialism*.—Our learned brethren of the medical profession say that there are ninety-two kinds of rheumatism. There are at least that many kinds of Socialism. If by Socialism is meant the abolition of the private ownership of property, or its ownership in common, it is impossible until human nature is changed. It was tried in the days of the Apostles and failed. Its most notable product was the incident of Ananias and Sapphira. If by Socialism is meant municipal ownership of lights and water and State or Government ownership of railroads, we have them already.

6. *"The right to vote is a privilege and not a right."*—This statement is without foundation, and rests solely upon the repetition of assertion. We did not fight Great Britain for the "privilege" of self-government,

but for the "right" to govern ourselves by our own votes. Every person who has sufficient intelligence and good character has a right to share in the government. The majority have the right to *exclude* lunatics, idiots, infants, and illiterates because they are not mentally competent, and to exclude convicts because they are morally defective. We excluded negroes till 1868 because they were mostly uneducated and incompetent. It was a mistake that the State and Federal Constitutions admitted them in 1868. After experience proved this, the "Grandfather Clause" in 1898 excluded them—not as negroes, but as "illiterates." This clause has now been held unconstitutional by the U. S. Supreme Court because we exempted white illiterates.

Women are as competent, morally and mentally, as men, and have a right, and not a mere privilege, to vote and should not be excluded except in those cases in which men are excluded—i. e., when they are lunatics, idiots, infants, illiterates, or convicts.

There was never a more unfounded statement than that the vote is a mere privilege granted by a superior, unless our American Revolution and all other struggles for freedom the world around were based on falsehood. When did the male sex become so *superior* that they should "grant" or refuse such "privilege" to their mothers, wives, sisters, and daughters?

You will find that when argument fails, one or the other of the above phrases will be thrown at your head, as if an epithet were an argument; and when these fail there is the customary appeal to race and sectional prejudice. In the language of the Apostle, "Let none of these things move you."

There are other matters, but I will close with the following quotation from the *Areopagitica*, by John Milton: "For this is not the liberty which we can hope for, that no grievance ever should arise in the commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."

And I again quote from the same author: "I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat."

Young gentlemen, do not look forward to a life of ease, nor float with the current. Stand for better and higher things, so that the condition of the great dumb masses may be somewhat better because you have lived. In the language of the great Lord Mansfield, "Seek not the popularity that is run after," but that which follows noble deeds. Give to the people among whom you live the best that is in you; it will come back to you.

Infallible Government

By the Odd Man

CHIEF JUSTICE WALTER CLARK in *The American Law Review*.

There is no question that is more important than the right of the people, through their freely elected representatives, to enact their will into law. The men who made the Federal Constitution at Philadelphia were naturally doubtful of the safety of property under a government by the people. Up to that time manhood suffrage had been entrusted to the people in none of the States. Suffrage pertained to the ownership of property, and there were other restrictions. Besides, at that time, the masses were uneducated and the experiment of government by the people was new and untried. It had not existed in England, which was a government by the landlords who sat in the House of Lords and dictated the selection of the members of the House of Commons.

The Constitution at Philadelphia restricted the making of laws to this extent and no further: that the bill had to be passed by one House and then by the other, and then it had to be approved by the Executive, and, failing to receive his approval, it was necessary to be passed by a two-thirds vote in each House. This was deemed an ample security that the law was in accordance with the Constitution, and should be enforced, subject to the right of the people to repeal it by the election of members of the House and Senate and President.

THE JUDICIAL VETO

There is not a line in the Constitution which intimates an intention that a majority of the Supreme Court should set aside a statute that had been passed in this manner and approved by the President. It is contended that the proposal to give the judges such power, and which was four times defeated in the Convention, was a proposition that the judges and the President should have revisionary power over an act before it passed. Be it so. This would have been less objectionable than the present system, for it would have given the Congress an opportunity to conform the statute to the revision, but it is most singular logic to hold that because such power of revision was four times defeated, therefore the Constitution gave to the courts the power to set aside a law after it was enacted.

If the Constitution gave such power, *all that is necessary is to point it out*; and this *no man has yet done*. The Convention knew how to

give the President the veto power, and it took care not to make it absolute, but merely suspensive and subject to be overruled by a two-thirds vote. If it intended to give the judges the veto it certainly would have said so plainly, and also more certainly would not have made it absolute, but subject to review by a prescribed vote in Congress, as it did in regard to the presidential veto. An irreviewable veto by five men is as objectionable as if exercised by one. The Decemvirs were as odious as Tarquin.

SUPREMACY OF FEDERAL LAWS

It is true that there is a provision that the laws enacted by Congress shall be supreme over those enacted by the States. This is necessary in a federal form of government, and it is the function of the Supreme Court to construe the meaning of acts of Congress; but this does not include the power to repeal them. Neither do the State Constitutions confer power upon their Supreme Courts to set aside an act of a State Legislature which has been passed with the approval or over the veto of the Governor. The State courts, like the U. S. Supreme Court, must recognize the supremacy of the Federal laws over the State laws.

It is argued that this implies a power in the courts to pass upon the constitutionality of an act of Congress, for "otherwise it is no law." This has no warrant in the Constitution. That provides that when the statute has been passed by one House and then by the other, and approved by the President, or passed by both Houses over the presidential veto, it is a law. Any assumption by the courts or any one else thereafter to set it aside is without warrant, except in sheer judicial assumption.

In England the veto has not been exercised by the executive in any case for more than two centuries; and by recent legislation when the bill is passed by the Lower House, the representatives of the people, on two separate occasions it becomes a law in spite of an adverse vote of the Upper House. Yet England is not governed by a mob, and they are unduly frightened at popular rule who doubt the capacity of the American people, acting through the House and Senate and with the approval of the President, to pass legislation, subject only to the review of the people themselves in the choice of new agents.

As further evidence, the Constitution did not create the Supreme Court, but left it with Congress to prescribe its membership, and, with unimportant exceptions, left its jurisdiction to be prescribed by Congress, "with such exceptions and under such regulations as Congress shall prescribe." As to the lower Federal courts, they were to be "ordained and established" by Congress from time to time, which, of course, must prescribe and regulate their jurisdiction. In 1803 Congress abolished sixteen Federal Circuit Courts, and from time to time since has abolished District Courts. It has increased and reduced at will the number of Supreme Court judges. Congress also has the power to remove

the judges by impeachment. These provisions of the Constitution certainly do not indicate the irreviewable supremacy of the Supreme Court (or of five members thereof) over the law-making body.

In England, the judges once (and only once) held an act of Parliament invalid, and then Chief Justice Tressilian was hanged and his associates were banished to France. With such encouragement, the courts in England have never since attempted a like feat. There have been expressions from time to time in the English courts that an act of Parliament was unconstitutional, but those who are conversant with the English decisions know that this was merely an expression by the judges that such legislation was in their opinion not conformable to the unwritten Constitution of the Kingdom, but in not one of those cases was it held that the act was void, and the courts have not attempted to set it aside or dared to disregard it. In this connection, reference may be had to the misimpression that the English judges hold for life, which they do not. Prior to the Revolution of 1688, the English judges held subject to the pleasure of the king, who could and did remove them at will. Ever since 1688 they hold subject to the will of Parliament, which can remove any judge by a majority vote without a trial. A similar provision obtains in the Constitution of Massachusetts, and though Daniel Webster in the Constitutional Convention of his day earnestly endeavored to have that provision stricken out it was and still is retained. In practice, this power has been seldom exercised in England, and never, I believe, in Massachusetts, but the power is there and is a full recognition of the fact that the law-making body, and not the court, is the supreme power in the State to prescribe its laws.

MARBURY v. MADISON

The Court in *Marbury v. Madison* declared (though in an *obiter dictum*) that it had power to hold an act of Congress unconstitutional, but it did not exert that power for fifty-four years—till the *Dred Scott* case in 1857, when (in another *obiter*) it held the Missouri Compromise invalid, and thereby “turned loose the dogs of war.” This decision has been followed since by the Court construing the language of the Fourteenth Amendment, which was enacted for the protection of the newly emancipated slaves (which it did not effect) as conferring such power. But unless the Constitution made the Supreme Court (or rather five members thereof) the supreme and ultimate power in the government, the decision in *Marbury v. Madison* and all decisions since based on it cannot amend the Constitution. The proper mode to amend the Constitution is through the law-making department of the Federal Government, with the ratification of the law-making bodies in three-fourths of the States. In this there is no indication that the courts are to have any power in amending the framework of our Federal Union. It is solely a matter for the people acting through their duly elected representatives.

There has been a great effort by lawyers representing aggregated wealth to arouse the *esprit du corps* of the legal profession, as if to deny the infallibility of five lawyers on the Supreme Court, is an attack upon the lawyers of the country. There is nothing in the Constitution which entrusts the control of our Government to any one profession or calling; but if, as some seem to argue, it should be entrusted by tacit consent to the lawyers of the country, there remains the fact that on an average more than 60 per cent of the Legislatures and of both Houses of Congress and of the State Executives and of our Presidents have been lawyers, and to admit that the power to overrule their action resides in the infallibility of a majority of five lawyers at Washington, and as to State legislation in a majority of the State Supreme Court, is the greatest reflection upon the Bar instead of an honor conferred upon it. There is never a session of Congress in which there is not more legal ability in the two Houses and the President than there is in any five men upon the Court; and the same is true as to the State Legislatures and Governors and the State courts. Congress and the President are elective and reviewable, but the Court is not.

COURTS NOT INFALLIBLE

The Supreme Court has not been infallible. Its action in the *Dartmouth College case* has been entirely overruled by provisions inserted in the several State Constitutions, and the method in which that decision was brought about conferred no credit upon the Court of that day.

The Court in many cases has held that its own action was unconstitutional by overruling its former decisions. As to the decision in the *Legal Tender case*, every one knows how a reversal was brought about by reducing and increasing the number of judges. In the *McCardle case* Congress asserted its prerogative by prescribing "Such exceptions and regulations" as prevented the Court from attempting to set aside the act of Congress in question, though the lower court had already passed upon it. In the *Income Tax case* the Court first affirmed its unbroken precedents of a hundred years, and then by a change in the vote of one judge reversed it, thereby declaring its previous action unconstitutional, and necessarily holding that it was not infallible.

The *Lochner case*, which held that the law-making authority could not restrict the hours of labor to ten hours a day, has since been overruled by the decision as to the Adamson Law holding valid legislation limiting the hours of labor to eight hours. The judicial somersault as to the income tax required twenty years to remedy by a constitutional amendment, and in the interim transferred \$3,000,000,000 from the over-rich upon whom the law-making body had placed a fair share of the burdens of the Government, and by judicial enactment transferred it to the laborers and farmers of the country. Shall this always be necessary?

If the judges were infallible, there might be more excuse for this assumption of power; but the effect of the *Income Tax decision* and many

others shows why this claim of absolute, irreviewable, and ultimate sovereignty in a majority of the Court is maintained. It is simply because the decisions in those cases have inured to the protection of the possessors of aggregated wealth or self-styled "vested interests." The lawyers representing those interests are zealous to assail those who deny that this power is conferred by the Constitution. Without any reflection upon the incumbents of that Bench in any period of its history, it has been but natural that men who have achieved prominence as the representatives and counsel of great corporations have been those most generally selected by the influences which control appointments to the Bench. If the power resides in such infallible majority, whether of the Federal or State Supreme Courts, to negative the action of the bodies elected by the people to make their laws, with the approval of the executives chosen by the people, then the control of our Government is in whatever influences can secure the appointment or selection of a majority of the Court. Of course the great "Interests" and "Big Business" are alarmed at the denial of such power in the courts and plausible arguments can always be made by lawyers.

WHAT CLAUSE IN THE CONSTITUTION?

The question, however, narrows down to this: "What clause in the Federal Constitution confers upon the Court the irreviewable veto upon an act of Congress passed by the two Houses of Congress and approved by the President?" If there is such, let it be pointed out and end the controversy. All the argument in the world cannot put it there. If the clause is there, any one who can read can see it as well as a robed judge.

It is a singular argument when the ruling of the Court in conferring this power upon itself is questioned to cite subsequent rulings by the courts to the same effect. If the first ruling was an illegal assumption and erroneous, all the subsequent decisions are the same. One hundred times zero is zero still. The repetition of an error does not make it true. The only question is: "Is there such provision in the Constitution?" That is the sole test. If there is, no argument is needed. Simply let it be pointed out. The resort to argument, however ingenious, is in itself an admission that the power is not granted the Court in the Constitution, but was created by the Court in its own favor.

Does the governing power reside in the people who elect the House and Senate and the President, or in the influences which shall be able to secure the appointment of five judges of their own way of thinking on public questions?

The King of England had the unquestioned and absolute veto power (though for two centuries he has not used it). Yet if our Constitution had not given the President in express words the veto, and he had attempted to veto an act of Congress on the ground either that the King of England had such power, or that the act of Congress was unconstitutional, he would have been promptly impeached.

On the other hand, the courts in England never had the power to set aside an act of Parliament, and our Constitution does not give it to them, but the Courts have assumed it!

GOVERNMENT BY THE ODD MAN

The U. S. Supreme Court has on several occasions set aside an act by a vote of 5 to 4—*i. e.*, it held that the two Houses of Congress, the President, and four members of the Court were fallible, but the other five were infallible. The divine infallibility of heaven rests therefore on the odd man. But in the *Income Tax case* the divine afflatus which rested on the odd man itself changed. After holding the tax valid according to the precedents of one hundred years the odd man went over to the viewpoint asserted by the Interests and *eo instanti* his four infallible associates of the day before became fallible and the four fallible judges of the day before *eo instanti* became infallible. The divine afflatus on the odd man shifted like a summer's breeze. The action of Congress and the President expressing the will of a free and great people became null and void. It took twenty years and a constitutional amendment to recover the right which Congress had exercised till 1893 to tax incomes. In those twenty years great wealth received an exemption of three thousand millions of dollars which had been thus shifted upon the laborers and farmers of the country.

“Making the Word of None Effect by Their Traditions”

By CHIEF JUSTICE WALTER CLARK.

(Reprinted from *The Public*.)

A lawyer would never think of construing a statute by industriously getting together the statements of the members of the Legislature, or of Congress, many years afterwards as to what they intended, or by procuring their views upon the general subject. Yet that is what has been attempted to be done in regard to the Constitution of the United States. The intent of the members of the Convention is immaterial even if it could be proven in this way. The question is, What power does the language of the Constitution confer on the courts? That language is as readily ascertainable today as at any other time and can be determined by any one who can read the English language. Certainly no one has ever asserted that there is any clause of the Constitution which expressly confers on the courts the veto power which the Constitution does confer upon the Executive.

The power is not expressly conferred and the Court could not assume it by argument. The fact that there have been decisions—in *Marbury v. Madison* and in the *Dred Scott* case before the war, and several cases since—cannot authorize the courts to take a power if it is not granted them. To assert this is to do like the Pharisees, who the Master asserted “Made the Word of none effect by their traditions.”

Alexander Hamilton, in the 81 Federalist, declared there was not a syllable in the Federal Constitution giving the courts this power. No man more earnestly desired that the Court should have this power, for of all the leading men of his day he most feared government by the people. His great opponent, Thomas Jefferson, on the promulgation of the *obiter dictum* in *Marbury v. Madison*, promptly denied that the courts had such power under the Constitution.

It was a shrewd move on the part of Marshall (who, by the way, was Jefferson's near kinsman) to assert the power as an abstract proposition instead of in a concrete form which President Jefferson would have negatived.

When Marshall made another of his unwarranted assertions of power, President Jackson said, “John Marshall has made his decision, has he? Now let us see him execute it,” and it was never executed, and to this day has remained a harmless paper in the archives of the court.

When in 1857, in the *Dred Scott* case (fifty-four years after *Marbury v. Madison*), the Court for the first time assumed to set aside an act of Congress, relying upon the support of the then President (whose letters expressing the desire that the Court should so decide are still extant) Abraham Lincoln, as promptly and as emphatically as President Jefferson denied the authority of the Court to exercise such power. The same views have been expressed since by James A. Garfield, Theodore Roosevelt, and many others. Let us admit that their views can avail no more against the proposition than that of the judges in favor of granting themselves the supreme power over the other two departments of the Government. The test is not what any men, however distinguished, have said on either side of the question. The sole test is what clause in the Constitution confers this supreme power upon five men to set aside an act of the two Houses of Congress approved by the President? If there is such clause, no argument is needed; if there is none, then the traditions of the elders cannot supply its absence in the word.

OUGHT THE COURTS TO HAVE THE VETO POWER?

Neither is the question to be debated whether the courts ought to have this power. The inquiry is, Does the Constitution confer it? It is not an incidental or merely inferential power. It is the greatest of all powers and cannot be created by argument. There is power to review the action of Congress and the President, but it is not given to the Court. That power is the people, of whose sovereignty the great reactionary Interests are so fearful.

It is true that the Constitution gave the "Judicial Power" to the Supreme Court, "subject to exceptions and regulation by Congress," but to assert that the judicial power embraces the supreme power to disallow the action of the law-making body is to beg the very question at issue. Such power did not exist in England, nor does it exist today in any other country. It could not be a part of the judicial power under the Constitution of the new government unless it was put there by the Constitution.

Those who doubt the capacity of the people for self-government can suppose cases where the two Houses of Congress and the President may conspire to act foolishly and unconstitutionally. If so, why not also suppose that five men on the Supreme Court, who, unlike Congress and the President, have not been placed in their positions by the expressed confidence of the people at the ballot box in their integrity and ability, should act foolishly or unconstitutionally? The two Houses of Congress and the President, acting in the open and subject to review at the ballot box, are less likely to conspire against the rights of the people than five men who, as Jefferson expressed it, may "huddle up their decisions in secret conclave." It is no reflection upon the Court to say that those who laid the foundation of the new government believed that

the House and Senate and President acting together could be trusted with law-making power, subject to the approval or disapproval of the people. The Constitution required no other review. No amendment subjecting Congress to supervision by the Court could be inserted in the Constitution today.

The people elect the two Houses of Congress and the President, and do not need to be "defended" from them by the judges, in whose selection they have no voice and who hold for life without regard to the constitutionality of their actions or popular approval.

NOT A JUDICIAL POWER AT ALL?

The power to set aside or nullify an act of Congress or a State Legislature is a purely political power and is so recognized by the Constitutions which give the veto to the Executive. It comes under no definition or conception of the judicial power, which is to judge between the parties to a controversy. Neither the Government nor the State is a party to these proceedings, in which its supremest power—that of enacting laws—is nullified. As claimed and exercised by the courts, it is the absolute, autocratic power, because it is irreviewable. Those whose interest it is to have such power over the legislative and executive assert it for their own ends. The wonder is that it has ever been acquiesced in at all under a free form of government.

The Constitution does not confer the absolute "judicial power of the U. S." upon the courts. If it did it nowhere prescribes that the "judicial" power includes the power to nullify the action of the law-making power approved by the President. To assert that is begging the very question at issue. The courts in England and all other countries exercise the full judicial power of their respective countries, but in none of them do they assume to set aside an act of the department charged with the duty of making the laws. The judicial power that is conferred by our Constitution is expressly made subject "to such exceptions and under such regulations as Congress shall prescribe." It did prescribe such exceptions in the *McCardle case*, and Senator Owen's bill proposes to do the same thing.

The Constitution is written in plain English and should be easily understood of all men. As written and adopted, it confers the law-making power upon the House and the Senate, with the safeguard of the approval of the President, which, if he refuses, can be overcome by a two-third vote in each House. There is no hint of any further review. The Court, without any authority, has created itself a *Privy Council* of appointive, life-tenure members, five of whom in secret conclave can defeat the law-making power given by the Constitution.

Judicial Supremacy Unwarranted by the Constitution

By CHIEF JUSTICE WALTER CLARK.

(Reprinted from *The Public*.)

The jurisdiction conferred on the Supreme Court by the Constitution, Art. III, is small, and then follows: "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions and under such regulations as Congress shall make.*"

The inferior courts are "ordained and established" by Congress, which must prescribe the limits of their jurisdiction. The claim of supremacy by the Judiciary over its creator is therefore not authorized. It is asserted that it is "necessary to the independence" of the Judiciary. In fact, it is the assumption by it of

SUPREME, IRRESPONSIBLE, AND AUTOCRATIC POWER

Of course every department of the Government takes an oath to support the Constitution; but the supreme power to review, whether they do or not, is reserved to the *people*, and is nowhere given to the Judiciary.

If Congress disobeys the Constitution the members of both the House and Senate are chosen by the people and can be reviewed at the next election.

If the President disobeys the Constitution, he is chosen by the people and his acts can be reviewed at the next election.

If the Federal Judiciary do an unconstitutional act, they are not chosen by the people and cannot be reviewed at the next election. That they have acted unconstitutionally has been held by themselves in reversing the *Legal Tender decision* and the *Income Tax decision*, in the *Ten-hour case* (*Lochner case*), virtually reversed in the *Adamson Law case*, and in other cases.

In the *Income Tax case* the last decision was wrong, and it required eighteen years to get the evil corrected by constitutional amendment, and in the meantime that one vote of one judge transferred 3,000 millions of dollars taxation from the predatory rich and placed it upon the producing classes of the country.

Is it not worth while to prevent other abuses by an irresponsible court, a bare majority of whom may again, as so often in the past, mistake their own economic views for the Constitution.

An act similar to that now proposed by Senator Owen, depriving the Court of jurisdiction over the Reconstruction Acts, was admitted by the Court itself as depriving them of power in *McCardle ex parte*, 6 Wallace, 324.

The first usurpation, in *Marbury v. Madison*, during the incumbency of Chief Justice Marshall, was made by an *obiter dictum*, and was not repeated as to an act of Congress for fifty-four years, in the *Dred Scott case*; and this brings me to the purport of this article, which is to call attention to the motive for the *obiter dictum* in the *Marbury case*, as follows:

INVENTED TO SAFEGUARD SLAVERY

In laying the foundation of the Constitution, there began the trouble between the free and slavery system of labor, which was a continuous struggle down to 1861. It was compromised by the Constitution giving three-fifths of a vote to slave owners as representatives of their slaves. It was recognized that by the increase of the white vote at the North, as well as by immigration, the South would soon lose control of the House, and that it would ultimately lose the control of the Senate, though for a long time the parity was kept up by always admitting a slave State and a free State at the same time. On the admission of Missouri in 1820 we came near a dissolution of the Union. The Mexican War was largely caused by an effort to maintain the political equality of the slave States in the Senate. For a long time the South held the presidency by nominating a "Northern man with Southern principles," but when Lincoln was elected it was seen that that could not be relied on.

The *Marbury v. Madison* decision was simply "throwing an anchor to windward" by giving to the Supreme Court power to invalidate any action of Congress, though approved by the President, which should jeopardize slavery, and which thus made the Court a third line of defense that would last the lifetime of the judges. This was shattered by the hostile reception given the *Dred Scott case*, and the results of the Civil War. The contest for slavery made the South "A section apart," and the waves have not yet entirely subsided. They have a proverb in wind-swept Spain, a land of wind mills, "Though the mills are down, the winds are blowing there still."

Marbury v. Madison having been thrown up as a bulwark for the Slavery Trust when the Fourteenth Amendment was passed with a provision intended for the protection of the emancipated negro (which it did not effect), the Interests created by the war, through the new appointees from time to time on the Supreme Bench, secured for themselves the construction by the Court of a newer and deadlier theory than *Marbury v. Madison*, which was outworn. As to the Reconstruction Acts, Congress made the Court stand off. But as the Court is appointive, and for life, the people have no hand in choosing them and no power to review them, and if their assumption of the supreme and ulti-

nate power of review of the action of Congress shall continue to be substituted for that of the people, then aggregated wealth, following the example of the slavery leaders down to 1861, have the irreviewable power to control the Government and set at naught the will of the people on all public questions.

In Haines' "Judicial Supremacy," pp. 234 and 282, it is stated that twice before—in 1825 and 1867—bills like Senator Owen's present bill were introduced. That in 1867 passed, but applied only to the Reconstruction Act, and was obeyed by the Court in the *McArdle case*.

JEFFERSON AND LINCOLN

When the *Marbury v. Madison* decision was rendered it was at once denounced by President Thomas Jefferson as an usurpation unwarranted in the Constitution, and when it was repeated fifty-four years later in the *Dred Scott case* it was as vigorously denounced by Abraham Lincoln, and these men were, respectively, the very chiefest of the apostles of the two great parties now before the country.

Mr. Jefferson wrote to Chief Justice Spencer Roane of Virginia: "If the judges have the power to annul statutes in conflict with the Constitution, then the Constitution and laws are a mere thing of wax which they may twist and shape into any form they please." The power of the courts to do so has been disputed at all times.

In passing the Keating Child-Labor Bill, the House and Senate declared the public policy of the people, by whom they were elected and whose will they represented. The President not only approved, but requested, the passage of the act. The odd man on the Court, imbued with the ideas of judicial supremacy and the rights of Capital over Labor handed down from John Marshall and a Court impressed with the necessity of protecting slavery, set the act aside. Where does the governing power reside?

Senator Owen's bill, reënacting the Child-Labor Law and prohibiting the Supreme Court from invalidating it, can be more speedily adopted than a constitutional amendment, and will be as effective.





